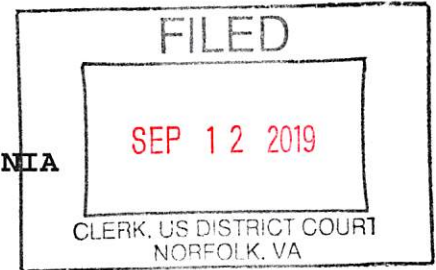


UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division



RYRICKA NIKITA CUSTIS, #1207403,

Petitioner,

v.

ACTION NO. 2:19cv214

HAROLD W. CLARKE,
Director, Virginia
Department of Corrections,

Respondent.

FINAL ORDER

Petitioner Ryricka Nikita Custis ("Custis"), a Virginia inmate, filed a *pro se* action pursuant to Rule 60(b) of the Federal Rules of Civil Procedure to set aside the dismissal of his section 2254 habeas petition for fraud on the Court. ECF No. 1. Custis asserts that, in the memorandum in support of the motion to dismiss Custis' previous federal habeas petition, the respondent committed fraud on the Court by misstating that the victim identified Custis at trial in the Circuit Court for the County of Accomack in 2008. *Id.* at 3. Custis' claim, that this Court's denial of his federal habeas petition on the merits was a result of fraud, is not properly considered under Rule 60(b), and is instead a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254.

Custis previously filed two petitions for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in this Court attacking the

same 2008 convictions. His first petition was dismissed with prejudice on April 11, 2014. 2:13cv302, ECF No. 23. The United States Court of Appeals for the Fourth Circuit denied Custis a certificate of appealability on August 1, 2014, and denied his petition for rehearing on October 28, 2014. 2:13cv302, ECF Nos. 28, 31.

Custis' second petition was denied with prejudice on September 17, 2018. No. 2:17cv476, ECF No. 26. The Court of Appeals for the Fourth Circuit modified the dismissal order to reflect dismissal without prejudice for lack of subject matter jurisdiction, and affirmed the dismissal without prejudice on February 6, 2019. No. 2:17cv476, ECF Nos. 31, 32. The Court of Appeals for the Fourth Circuit denied Custis' petition for rehearing on March 25, 2019. No. 2:17cv476, ECF No. 34.

Custis' current action was referred to a United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C) and Rule 72 of the Local Rules of the United States District Court for the Eastern District of Virginia for report and recommendation. ECF No. 3. The report and recommendation, filed July 24, 2019, recommends that Custis' *pro se* motion to set aside judgment for fraud on the Court filed pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, should be denied and dismissed without prejudice as a successive section 2254 petition. ECF No. 4.

Each party was advised of his right to file written objections to the findings and recommendations made by the Magistrate Judge. On August 5, 2019, the Court received Custis' objections to the report and recommendation. ECF No. 5.

The Court, having reviewed the record and examined the objections filed by petitioner to the report and recommendation, and having made *de novo* findings with respect to the portions objected to, does hereby adopt and approve the findings and recommendations set forth in the report and recommendation. The Court, therefore, **ORDERS** that Custis' *pro se* motion to set aside judgment for fraud on the Court, ECF No. 1, filed pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, is a successive section 2254 petition, which is **DENIED** and **DISMISSED WITHOUT PREJUDICE** to Custis refiling his federal petition after obtaining an order authorizing the filing of a successive petition from the Court of Appeals for the Fourth Circuit.

Finding that the basis for dismissal of Custis' section 2254 petition is not debatable, and alternatively finding that Custis has not made a "substantial showing of the denial of a constitutional right," a certificate of appealability is **DENIED**. 28 U.S.C. § 2253(c); see Rule 11(a) of the Rules Gov. § 2254 Cases in U.S. Dist. Cts.; *Miller-El v. Cockrell*, 537 U.S. 322, 335-38 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483-85 (2000).

Custis is **ADVISED** that because a certificate of appealability is denied by this Court, he may seek a certificate from the United States Court of Appeals for the Fourth Circuit. Fed. R. App. P. 22(b); Rule 11(a) of the Rules Gov. § 2254 Cases in U.S. Dist. Cts. If Custis intends to seek a certificate of appealability from the Fourth Circuit, he must do so **within thirty days** from the date of this Order. Custis may seek such a certificate by filing a written notice of appeal with the Clerk of the United States District Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510.

The Clerk shall mail a copy of this Final Order to Custis and counsel of record for respondent.

/s/



Mark S. Davis
Chief Judge

Mark S. Davis
Chief United States District Judge

Norfolk, Virginia
September 12, 2019